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No. 07-1350

In The
Supreme Court of the United States

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

RODALE INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

GREGORY A. CLARICK
Counsel of Record
LARA M. KRIEGER
MANATT, PHELPS & PHILLIPS, LLP
7 Times Square
New York, NY 10036
(212) 790-4500

PAUL MCGINLEY
SUSAN ELLIS WILD
GROSS, MCGINLEY, LABARRE & EATON, LLP
33 South Seventh Street
Allentown, PA 18105
(610) 820-5450

Counsel for Respondent

QUESTIONS PRESENTED

Has Petitioner presented compelling reasons for this Court to review the Third Circuit decision in *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007), which applies this Court's governing implied private right of action jurisprudence in a manner consistent with every other court and academic commentary and which correctly concludes that 39 U.S.C. § 3009 does not provide for a private right of action?

DISCLOSURE STATEMENT

Respondent Rodale Inc. does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007), the Third Circuit correctly applied this Court's well-developed jurisprudence to conclude that the federal Unordered Merchandise Act, 39 U.S.C. § 3009, does not provide for a private cause of action. Neither the language nor the structure of the statute, nor its legislative history, evince *any* congressional intent to create a private remedy for the statute. Instead, Congress explicitly entrusted enforcement to the Federal Trade Commission ("FTC").

Petitioner presents no compelling reason to review the Third Circuit's ruling, as Supreme Court Rule 10 requires. Petitioner asks this Court to grant the writ of certiorari for two reasons: First, Petitioner asserts that, in *Rodale*, the Third Circuit improperly construed this Court's governing test for determining implied private rights of action as articulated by *Alexander v. Sandoval*, 532 U.S. 275 (2001). (Pet. 6-12) Second, Petitioner contends that *Rodale* conflicts with the 31-year-old Ninth Circuit opinion, *Kipperman v. Academy Life Insurance Co.*, 554 F.2d 377 (9th Cir. 1977). (Pet. 5-6) Petitioner is wrong on both accounts.

The Third Circuit correctly applied *Sandoval*. In *Rodale*, just as *Sandoval* requires, the Third Circuit considered whether Section 3009 manifests congressional intent to create a private right and a private remedy. The Third Circuit concluded that Section 3009, which expressly confers enforcement authority upon the FTC, does *not* evidence

congressional intent to create a private remedy and therefore does not provide for an implied private cause of action. That conclusion is unassailable.

Indeed, despite Petitioner's claim, the *Rodale* court and other lower courts have shown *no* confusion in interpreting and applying *Sandoval*. Under *Sandoval*, courts may imply a private right of action only if the statute evinces congressional intent not only to confer a private right, but also to provide a private remedy. *See Sandoval*, 532 U.S. at 286. *Sandoval* and its progeny are absolutely clear on the point, as are the courts – including *Rodale* – and commentators that have examined it. While Petitioner would have it otherwise, Petitioner has cited no authority endorsing his view that Congress's creation of private rights, standing alone, may give rise to a private cause of action. That is not the law.

Moreover, there is no conflict among the Circuit Courts of Appeals concerning whether Section 3009 provides for an implied private cause of action. *Kipperman* – the only other Court of Appeals opinion addressing the issue – predated *Sandoval* by over two decades and did not have the benefit of this Court's many intervening decisions. These later cases uniformly support the conclusion that Section 3009 does not provide for a private cause of action.

The petition should be denied.

COUNTERSTATEMENT OF THE CASE

Section 3009 of the Postal Reorganization Act, 39 U.S.C. § 3009, regulates the business practice of sending merchandise to consumers without their consent, *i.e.*, unordered merchandise. The statute provides that the recipient of unordered merchandise may treat the merchandise as a gift and prohibits the mailer of such merchandise to bill for it. *See id.* §§ 3009(b), (c). The statute expressly authorizes the FTC to enforce its provisions. *See id.* § 3009(a) (citing FTC Act, 15 U.S.C. § 45(a)(1)). The statute and its legislative history are silent about a private right of action. (App. 18a)

In this action, Petitioner alleged that Rodale's book club violated Section 3009. Petitioner argued that Section 3009 provides for an implied private right of action and authorizes a range of private remedies. The district court disagreed and entered summary judgment against Petitioner on the ground that Section 3009 does not provide an implied private right of action. The Third Circuit affirmed. The Third Circuit analyzed this Court's substantial jurisprudence regarding implied private rights of action and carefully parsed *Alexander v. Sandoval*, 532 U.S. 275 (2001), as well as *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979), and other authorities. (App. 4a-10a) Applying *Sandoval*, the Third Circuit found that Section 3009 does not evidence congressional intent to create both a private right and a private remedy, and therefore held that the statute does not provide for a private right of action. (App. 10a-19a)

Rodale first considered whether Section 3009 confers cognizable "rights" on individuals. (App. 11a-12a) The Third Circuit concluded that the statute confers only one express private "right": the right to treat unordered merchandise as a gift, *i.e.*, the right to keep such merchandise without charge. (App. 11a (citing 39 U.S.C. § 3009(b)) The Third Circuit was doubtful that the remaining substantive provisions of Section 3009, which direct mailers to use "clear and conspicuous" labeling and forbid them from dunning recipients for unordered merchandise, confer additional private rights. (App. 11a-12a (citing 39 U.S.C. §§ 3009(b), (c)) The court then concluded that there was no evidence of congressional intent to create a private remedy to enforce the express right granted by Section 3009 or any of the statute's other provisions. (App. 12a-18a) The Third Circuit reasoned that the "text and structure" of Section 3009 demonstrate that Congress intended for the FTC, not private individuals, to enforce these provisions. (App. 13a-18a) The court also noted that no legislative history indicates otherwise. (App. 18a)

The Third Circuit analyzed and correctly applied the prevailing Supreme Court precedents to conclude that Section 3009 does not provide for an implied private cause of action. There is no need for further review.

REASONS FOR DENYING THE PETITION

The Court should deny the petition because it presents no "compelling reason" for review. *See* Sup. Ct. R. 10.

Rodale faithfully interpreted and applied *Sandoval's* analytical method for determining whether a federal statute provides for an implied private right of action. According to Petitioner, *Rodale* – and every single court and academic commentary – misreads *Sandoval.* Far from showing why review is necessary, Petitioner actually demonstrates that review is inappropriate: *Rodale* is consistent with every authority construing *Sandoval* and, in fact, with *Sandoval* itself.

Petitioner's attempt to manufacture a conflict among the Circuit Courts of Appeals is equally unavailing. A single 31-year-old opinion that long predated *Sandoval* and this Court's significant jurisprudence in the intervening years hardly demonstrates that, today, courts are or ever will be in disagreement about the availability of a private right of action under Section 3009.

Review is not warranted, and this Court should deny the petition.

I. THERE IS NO UNCERTAINTY IN INTERPRETING *SANDOVAL*

Petitioner cites no authority – whether lower court opinions or academic commentary – to support his baseless argument that *Rodale* and other courts have misread *Sandoval* to "establish a standard that effectively eliminates the doctrine of implied private rights of action." (Pet. 12)

The Third Circuit, in a thorough and thoughtful

analysis of Supreme Court jurisprudence, properly held that "the relevant inquiry for determining whether a private right of action exists appears to have two steps: (1) Did Congress intend to create a personal right? and (2) Did Congress intend to create a private remedy? Only if the answer to both of these questions is 'yes' may a court hold that an implied private right of action exists under a federal statute." (App. 10a)

Petitioner attacks *Rodale*'s analysis on two grounds. First, according to Petitioner, *Rodale* erroneously held that *Sandoval* requires a showing of congressional intent to confer both a private right and a private remedy. Second, Petitioner contends, other lower courts and commentators have similarly misread *Sandoval*. Neither argument has merit.

A. *Rodale* Correctly Interpreted And Applied This Court's Prevailing Rulings Concerning Implied Private Rights Of Action

Petitioner attacks *Rodale*, claiming that the Third Circuit misconstrued *Sandoval*. Petitioner is wrong.

According to Petitioner, the private right of action question in *Sandoval* hinged on whether the relevant "rights-creating language" appears in a regulation or the enabling statute: "The rights-creating language in *Sandoval* was insufficient because it appeared in a regulation, not the statute, and it created rights beyond those provided by the

statute." (Pet. 11) Petitioner misreads *Sandoval*.

Critically, *Sandoval* clarified that a private right of action will not be implied unless a statute both confers private rights *and* contemplates a private remedy. As this Court itself later explicitly held in *Gonzaga University v. Doe*, 536 U.S. 273 (2002): "[E]ven where a statute is phrased in explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (emphasis in original) (quoting *Sandoval*, 532 U.S. at 286).

Petitioner's cramped reading of the opinion as applicable only to analysis of regulations (*see* Pet. 12-13) has no support in *Sandoval* whatsoever. In fact, Petitioner's authorities uniformly recognize that *Sandoval* modified earlier implied private right of action jurisprudence in *all* cases and, most importantly, clarified that the Court has abandoned the preeminence of the private right of action test articulated in *Cort v. Ash*, 422 U.S. 68 (1975). (This Court's recent opinions on this issue, including last Term's *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, __ U.S. __, 128 S. Ct. 761 (2008), are discussed below.)

This Court too consistently has recognized that *Sandoval* distilled what already was evident in the opinions following *Cort v. Ash*: that the Court had "abandoned" its earlier jurisprudence and has "repeatedly declined to 'revert' to the 'understanding of private causes of action that held

sway 40 years ago.'" *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (quoting *Sandoval*, 532 U.S. at 287).

As recently as last Term, this Court reaffirmed that courts should be wary of implying private rights of action and that, when considering whether to do so, congressional intent to create a private remedy is paramount. *See Stoneridge*, 128 S. Ct. at 773 (refusing to expand implied private rights of action under § 10(b) of the Securities and Exchange Act and noting that "determination of who can seek a remedy has significant consequences for the reach of federal power"); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. . . . The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement [of the Alien Tort Statute] without the check imposed by prosecutorial discretion.") (citations omitted).

But none of this means, as Petitioner suggests, *Sandoval* or *Rodale*'s interpretation and application of it "*eliminate[s]* implied rights of action all together." (Pet. 12 (emphasis in original)) Rather, as this Court recently made clear, in proper circumstances, courts still should find implied private rights of action. Thus, this Court recently held that a victim of retaliatory discrimination has an implied private right of action under Title IX of

the Education Amendments of 1972, Pub. L. No. 92-381, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 *et seq.*). *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 177-84 (2005). Notably, *Jackson*'s analytic framework is similar to *Rodale*'s. First, *Jackson* found that Title IX confers the private "right" to be free of retaliation. *Id.* at 174-78. But that was not the end of the analysis. Instead, *Jackson* proceeded to *Sandoval*'s next step and separately concluded that Title IX contemplates private enforcement by victims of retaliation. *See id.* at 179-84. As *Jackson* shows, Petitioner's fear – that all implied private rights of action will wither in the face of proper application of *Sandoval* – is unfounded.

Rodale followed *Sandoval*'s mandate that "'[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.'" (App. 9a (quoting *Sandoval*, 532 U.S. at 286)) *Rodale* analyzed the text and structure of Section 3009, as well its legislative history, to determine whether there was congressional intent to create a private right *and* a private remedy. (App 11a-19a) There is nothing revolutionary or improper in the opinion, and nothing warranting this Court's review.

B. Petitioner Concedes That *Rodale* Comports With All Other Judicial And Academic Analyses

Petitioner's belief that private right of action analysis begins and ends with a finding that a

statute includes "rights creating" language contradicts *Sandoval*, and no court or academic has adopted that view. In the face of that legal landscape, Petitioner opines that other lower courts, as well as academics, have misread *Sandoval* in the same way as *Rodale*, and that review is therefore appropriate. But the fact that courts and academics consistently (and correctly) interpret this Court's current jurisprudence is no basis for review. Petitioner would like the Court to believe that he is the only one who recognizes *Sandoval*'s true import. (Pet. 12-13) In truth, he apparently is the only one with difficulty understanding *Sandoval*.

This Court has settled the contours of its private right of action jurisprudence, and *Rodale* correctly interpreted and applied that law. There is no basis for review.

II. *RODALE* DOES NOT CONFLICT WITH ANY AUTHORITY – INCLUDING THE 31-YEAR-OLD NINTH CIRCUIT *KIPPERMAN* OPINION

Petitioner also argues that review is proper because *Rodale* supposedly conflicts with the Ninth Circuit's interpretation of Section 3009 in an opinion that predates *Sandoval* by 24 years. (Pet. 5-6 (citing *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 377 (9th Cir. 1977)) Petitioner's reasoning is flawed.

Kipperman's implied private right of action analysis was undertaken in a decidedly pre-

Sandoval world. Critically, despite finding an implied private cause of action, *Kipperman* explicitly found that Congress *never* considered whether Section 3009 would confer a private right of action, let alone that Congress *intended* to create one. 554 F.2d at 380. *Kipperman* explained that Congress had no need to consider the issue because "[i]n the usual situation the remedy provided by the recipient is immediate and self-executing. . . . [T]he automaticity of the remedy provided by Congress in the usual situation goes far to explain why it neither explicitly permitted nor barred private suits under section 3009." *Id.* Nonetheless, *Kipperman* found a limited implied private right of action for declaratory relief because that type of action "would be entirely consistent with the purpose of the statute." *Id.*

Time and the inexorable march of this Court's more recent decisions have passed *Kipperman* by. It does not create a split of authority among the Circuit Courts of Appeals, and cannot present a basis for review of the Third Circuit's opinion in *Rodale*.

CONCLUSION

The Third Circuit properly interpreted and applied this Court's test for discerning whether a federal statute authorizes an implied private right of action. There is no need for the Court to revisit this issue. This Court should deny the petition for writ of certiorari.

RESPECTFULLY
SUBMITTED,

GREGORY A. CLARICK
Counsel of Record
LARA M. KRIEGER
MANATT, PHELPS &
PHILLIPS, LLP
7 Times Square
New York, NY 10036
(212) 790-4500

PAUL MCGINLEY
SUSAN ELLIS WILD
GROSS, MCGINLEY,
LABARRE & EATON, LLP
33 South Seventh Street
Allentown, PA 18105
(610) 820-5450